No. 92-344



# In the Supreme Court of the United States

OCTOBER TERM, 1992

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GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
*Petitioners,*

*v.*

HAITIAN CENTERS COUNCIL, INC., ET AL.,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF FOR NICHOLAS DeB. KATZENBACH, BENJAMIN R. CIVILETTI, AND GRIFFIN BELL, FORMER ATTORNEYS GENERAL OF THE UNITED STATES OF AMERICA, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether Section 243(h)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(1), which forbids the Attorney General from "deport[ing] or return[ing] any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of * * * political opinion," applies to aliens who have been intercepted by government officials on the high seas.

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### INTEREST OF THE AMICI CURIAE[1]

This case concerns the scope of Section 243(h)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(1), which forbids the Attorney General from returning any alien

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

to a country if he determines that such alien faces persecution or death in such country on account of political opinion. The amici are former Attorneys General of the United States who, in that capacity, were responsible for administering the immigration laws of the United States. Accordingly, the amici are acquainted with the administration and enforcement of the immigration laws, as well as with their practical effect on the operations of the Executive Branch. They therefore have a continuing interest in the question presented in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

On May 24, 1992, President George Bush issued Executive Order, No. 12,807, which authorizes the Coast Guard "[t]o stop and board defined vessels * * * [and t]o return the vessel and its passengers to the country from which it came * * *." 57 Fed. Reg. 23,133, 23,133-134 (1992). In the view of the amici Attorneys General, Executive Order 12,807 flatly violates Section 243(h)(1) of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1253(h)(1). As we show below, that Section unambiguously forbids Executive officials from intercepting aliens on the high seas and returning them to another country without first determining that those aliens would not be returned to conditions of persecution.

1. The text of Section 1253(h)(1) is dispositive. In plain terms, Congress extended statutory protection to "any alien," wherever he may be found, whether on the high seas or elsewhere. Congress' use of "any" sweeps broadly, foreclosing the narrow construction urged by petitioners. Moreover, by prohibiting both "deportations" and "returns," Section 1253(h)(1) extends its protections to aliens everywhere – not just those who reach our shores.

2. The scope of Section 1253(h)(1) reflects Congress' carefully crafted decision in 1980 to *jettison* the very



limitations on which petitioners now rely. First, Congress added to Section 1253(h)(1) the words "or return," thereby prohibiting not only the *deportation* of aliens from the United States, but also the *return* of aliens to their native land from outside the United States. Second, Congress struck from the statute the phrase "within the United States," thus making clear that Section 1253(h)(1) applies to aliens both within and without the United States. And finally, Congress deleted prior permissive language in favor of the present command of the statute, prohibiting the Attorney General from deporting or returning aliens to conditions of persecution abroad.

3. These statutory changes assume additional interpretive force when the resulting language is compared with the many other sections of the INA in which narrower language appears. Indeed, at the very same time that the phrase "within the United States" was *excised* from Section 1253(h)(1), Congress *added* that phrase to other portions of Section 1253(h). Under ordinary principles of statutory construction, Congress' parallel enactments confirm the evident breadth of Section 1253(h)(1).

4. Petitioners' reliance on the presumption against extraterritorial application of United States law is misplaced. That presumption applies only when congressional intent to extend United States law extraterritorially is unclear, and only when extraterritorial application might infringe on the sovereignty of another nation. Neither precondition exists in this case. First, congressional intent to apply Section 1253(h)(1) extraterritorially is clear, given not only the statutory language, but also the subject matter covered by the statute – matters that are distinctly international in scope, and that seek to effectuate an international human rights obligation undertaken by the United States. Second, no comity concerns are implicated when, as here, the statute in

question governs United States conduct on the high seas, where no other nation exercises jurisdiction.

5. Finally, the language of Article 33.1 of the United Nations Convention Relating to the Status of Refugees, on which Section 1253(h)(1) was modeled, confirms the court of appeals' reading of Section 1253(h)(1). The language of Article 33.1 prohibits both expelling and returning a refugee. To avoid redundancy, this language can only be read to protect those refugees who are under the control of a Contracting Nation, whether within or without its borders. Further, the use of the term "refugee" in other contexts in the Treaty reflects the Treatymakers' intention to define "refugee" broadly in Article 33.1.

In particular, *amici* wish to stress the distinction between considerations of foreign policy (which are vested in the President) and the dictates of statutory law (which are set by the Congress). In the background of this case are serious and heartfelt disagreements about appropriate policy toward refugees from nations striven by political turmoil and oppression as well as plagued by chronic and desperate economic deprivation. Some believe (with the President) that the best course is to discourage mass exodus and work for political and economic reform. Some believe (with Respondents and their supporters) that basic humanitarian decency precludes such a course. While each of these *amici* entertain strong but differing beliefs on this question of foreign policy, we are united in the conviction that this case must be resolved not according to those beliefs, but by the law. Neither the humanitarian entreaties of Respondents nor the foreign policy concerns of Petitioner can or should override what – in our view – is the plain and unambiguous meaning of the statute governing this matter. We will therefore confine ourselves to dry issues of statutory language, in the firm conviction that the duty and authority



of the President to "take Care that the laws be faithfully executed" is defined by the words found in Acts of Congress.

## ARGUMENT

### SECTION 1253(h)(1) UNAMBIGUOUSLY APPLIES TO ALIENS INTERCEPTED ON THE HIGH SEAS

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut National Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992) (citations omitted). As the Court recently reiterated, "the legislative purpose is expressed by the ordinary meaning of the words used." *Ardestani* v. *INS*, 112 S. Ct. 515, 520 (1991) (citations and internal quotations omitted). This fundamental principle applies in construing the INA, no less than it does in other statutory contexts. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *INS* v. *Phinpathya*, 464 U.S. 183, 189 (1984). Under this well-settled principle, Section 1253(h)(1) plainly applies to aliens who have been intercepted on the high seas.

1. 8 U.S.C. § 1253(h)(1) provides in relevant part:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

There is no basis in the text of the statute for carving out an exception in the case of aliens apprehended on the high seas. By its terms, Section 1253(h)(1) applies to "any" alien, wherever he may be found, whether on the high seas or

elsewhere. The term "any" means just what it says – *any* alien, including those found on the high seas. As this Court has made clear, Congress' use of the word "any" in identifying the subject of a statute serves to "undercut[] a narrow construction" of the statute's scope, because "[i]t is difficult to imagine broader language" signifying Congress' intent. *United States* v. *James*, 478 U.S. 597, 604-605 (1986).

But Congress has not simply extended the protections of Section 1253(h)(1) to "any" alien. It has also emphasized that those protections cover both "deportation" and "return". As petitioners concede, Br. 34, the term "deport" refers to the removal of persons from within the United States. By contrast, the term "return" does not refer to – or even raise any inference about – the place from which one is returning or being returned. One can return or be returned *from anywhere* to a place or position that one formerly occupied. Accordingly, as the court of appeals observed, "the plain language of [§ 1253(h)(1)] demonstrates that what is important is the place 'to' which, not from which, the refugee is returned." Pet. App. 23a.

2. The present language is not accidental. To the contrary: Section 1253(h)(1) reflects the considered decision of Congress to jettison prior, narrowing language in favor of the present all-encompassing protections.

Prior to 1980, Section 1253(h)(1) read:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time he deems to be necessary for such reason.

In 1980, Section 1253(h)(1) was revised in three ways – each of which bears on its present application.



*First*, Congress expressly added the term "or return" to Section 1253(h)(1), thus expanding the categories of Executive action addressed by the provision. Congress' addition of the disjunctive "or return" following the word "deport" in Section 1253(h)(1) indicates that Congress intended to add a prohibition on some action *other* than the deportation of aliens from the United States.[2]

*Second*, Congress specifically jettisoned the very language petitioners would read back into the statute. In particular, Congress *struck* the phrase "within the United States," which had previously modified the scope of Section 1253(h)(1). Congress thereby eliminated the very modification of the term "any alien" on which petitioners insist. That change in the law cannot be ignored. To the contrary, as this Court recently reiterated, " a change in language [must] be read, if possible, to have some effect." *American National Red Cross* v. *S. G.*, 112 S. Ct. 2465, 2475 (1992) (citations omitted). And "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of

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[2] Petitioners contend, however, that Congress' addition of the words "or return" to Section 1253(h)(1) was intended merely to bring excludable, in addition to deportable, aliens within the statute's scope. However, Congress was fully capable of using the term "exclude" or "excludable" when it intended to limit coverage in that manner. See, *e.g.*, 8 U.S.C. § 1182 (covering "excludable aliens"). "Congress' decision to use the broader phrase * * * strongly suggests that it did not intend to restrict the provision in the manner that petitioner[s] contend[]." *Patterson* v. *Shumate*, 112 S. Ct. 2242, 2246-2247 (1992) (footnote omitted).

other language." *Cardoza-Fonseca*, 480 U.S. at 442-443 (internal quotations omitted).[3]

*Third*, Congress replaced the prior permissive language – providing that the Attorney General "is authorized to withhold" deportation – with the present command to do so. Taken in conjunction with the other alterations, this revision reflects Congress' evident intent to protect "any" alien – wherever he may be found.

3. In short, by expressly *abandoning* the earlier, narrowing language of Section 1253(h)(1), Congress confirmed the wide sweep of that provision. And that conclusion is confirmed by comparing Section 1253(h)(1) with other sections of Part V of the INA – each of which is limited by its terms to aliens "in" or "within" the United States. See, *e.g.*, 8 U.S.C. § 1251(a) (categories of aliens "in the United States" subject to deportation); 8 U.S.C. § 1252(b) (finality of decisions of the Attorney General where an alien "is deported from the United States"); 8 U.S.C. § 1158 (direction for Attorney General to "establish a[n asylum] procedure for an alien present in the United States or at a land border or port of entry").

Moreover, at the same time that it *excised* the "within the United States" limitation from Section 1253(h)(1), Congress also *added* the subsections of Section 1253(h)(2), each of which *contains* the limitation on which petitioners rely. These subsections provide that withholding of deportation or return is not available to an alien who poses a danger to the "community of the United States," 8 U.S.C.

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[3] As the Second Circuit found below, "[t]o accept the government's reading of the statute, * * * would, in effect be [to] read[] the words 'within the United States' back into [§ 1253(h)(1)], which would counter Congress' plainly expressed intent to eliminate those limiting words in 1980." Pet. App. 18a.



§ 1253(h)(2)(B), has committed a serious nonpolitical crime "prior to the arrival of the alien in the United States," 8 U.S.C. § 1253(h)(2)(C), or poses a threat to the "security of the United States," 8 U.S.C. § 1253(h)(2)(D). These provisions illustrate (1) that Congress knew how to limit the scope of a statutory provision to aliens within the United States, and (2) that Congress did place such a limitation on provisions that are specifically – and solely – designed to protect the domestic security of the United States. In contrast, Congress specifically *excised* this limitation from Section 1253(h)(1), which focuses not on domestic security, but on protecting persecuted aliens by preventing the return of those aliens into the hands of their persecutors.

Again, these drafting distinctions cannot be treated as mere happenstance. As this Court has held in the context of this very statutory scheme, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Cardoza-Fonseca*, 480 U.S. at 432 (citations and internal quotations omitted); accord, *Patterson* v. *Shumate* 112 S. Ct. 2242, 2246-2247 (1992); *Gozlon-Peretz* v. *United States*, 111 S. Ct. 840, 847 (1991); *General Motors* v. *United States*, 496 U.S. 530, 537-538 (1990); *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *United States* v. *Naftalin*, 441 U.S. 768, 772-773 (1979). This "contrast between the language used in the two standards" (*Cardoza-Fonseca*, 480 U.S. at 432) thus confirms the court of appeals' sensible conclusion: that Congress meant what it said when it deleted the term "within the United States" from the text of Section 1253(h)(1).[4]

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[4] Petitioners contend that Section 1253(h)(1) is triggered "only 'if the Attorney General determines' that the alien would be (continued...)

4. Petitioners principally rely not on the language of Section 1253(h)(1), but on a presumption against extraterritorial application of United States statutes. No such presumption is warranted in this case.

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[4] (...continued)
threatened with persecution," and that the Attorney General maintains the discretion to refuse to make such a determination in cases of aliens on the high seas, but not in cases of aliens within the United States. Br. 30-32. Petitioners' reading of Section 1253(h)(1) is exceedingly strained, for two reasons. First, this reading relies on a distinction between aliens within the United States, who are entitled to no process, and those within the United States, who are entitled to process, that is completely absent in the statute, and that cannot be read into Section 1253(h)(1) by reference to implementing regulations. Second, Petitioners' interpretation ignores the operative verb "shall" -- added by Congress in 1980 -- which was intended to make the section legally mandatory and not discretionary. The Attorney General has the authority to make the determination *whether* the Haitians would be threatened with persecution or not upon their return to Haiti; he does not have the authority to refuse to make any determination at all, and then to return them to Haiti.

Unlike Petitioners' reading, a reading of Section 1253(h)(1) that recognizes that provision's mandatory character is completely consistent with the 1980 revisions to Section 1253(h)(1). In 1980, Congress sought to conform the protections due refugees under Section 1253(h)(1) to the dictates of Article 33.1 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, 176 (1954), which, as this Court has noted, creates "an *entitlement* for the subcategory [of refugees] that 'would be threatened' with persecution upon their return." *Cardoza-Fonseca*, 480 U.S. at 441 (emphasis added). A reading of Section 1253(h)(1) that permits the Attorney General to avoid completely the issue of refugee status entirely flies directly in the face of Congress' intent to broaden, rather than narrow, the protections provided in Section 1253(h)(1), in accordance with Article 33.1.



As the court of appeals recognized, the presumption against extraterritorial application of U.S. laws "is a canon of construction 'whereby *unexpressed* congressional intent may be ascertained', *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)(emphasis added), which 'serves to protect against unintended clashes between our laws and those of another nation which could result in international discord.' *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) [*"ARAMCO"*]." Pet. App 17a. Accord, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 14, 21-22 (1963)). Thus, the presumption applies if, but only if, each of two factors is present: (1) there is an ambiguity in the statute making it unclear whether Congress intended the statute to have extraterritorial application; and (2) there is a threat that extraterritorial application of the statute would infringe on the jurisdiction of another nation.

Here, Congress expressly addressed the question of extraterritorial application by amending the statutes to remove the geographical limitation "within the United States." When Congress's attention has been drawn to a question, and the language of the statute has been crafted in response to the issue, the only issue left is: what did Congress mean? There is no role left for general presumptions to play.

Moreover, with respect to the first factor, Congress need not specifically invoke extraterritoriality to make its will known. The nature of the statute at issue and the circumstances surrounding its enactment may reveal congressional intent as clearly as would express language indicating extraterritorial effect. Here, it is evident from the context and subject matter that Congress understood this statute to have extraterritorial application. Indeed, only an extraterritorial reading of Section 1253(h) is consistent with the international nature of the subject matter and the structure

of the INA.[5] To presume that the INA does *not* apply outside the boundaries of the United States in the absence of express language to that effect would make administration of the INA -- including the Executive actions in this very case -- impossible.

This case began when executive officials apprehended citizens of Haiti on the high seas -- itself an extraterritorial application of United States law. This action was authorized by Executive Order No. 12324 (Sept. 19, 1981), which in turn invoked the authority of *inter alia*, Section 212(f) of the INA, 8 U.S.C. § 1182(f). Yet ironically, this Section of the INA contains no language expressly indicating that it has extraterritorial application. Like Section 1253(h), Section 212(f) refers simply to "any aliens or . . . any class of aliens," making no mention of geographical location. It is hard to see why Section 212(f)'s reference to "any alien" would apply to aliens on the high seas, if the reference in Section 1253(h)(1) to "any alien" does not. Only by a selective application of the presumption can the Executive assert the extraterritorial authority to apprehend aliens on the

[5] Conversely, this Court has generally construed quintessentially domestic legislation to apply only within the United States, especially where the party urging extraterritorial application of the statute has pointed to no more than boilerplate jurisdictional provisions in support of extraterritorial application. *New York Central R. Co. v. Chisholm*, 268 U.S. 29, 31-32 (1929)(Federal Employers Liability Act does not apply extraterritorially); *ARAMCO*, 112 S.Ct. at 1232 (Title VII of the Civil Rights Act does not apply extraterritorially); *McCulloch*, 372 U.S. at 21 (National Labor Relations Act does not apply extraterritorially); *Foley Bros.*, 336 U.S. at 285 (Eight Hour Law does not apply extraterritorially).



high seas, but deny them extraterritorial application of the privilege against forcible return.[6]

Similarly, petitioner contends that the proper procedure for a Haitian refugee wishing to enter the United States is to apply for asylum in Haiti, pursuant to Section 207 of the INA. But Section 207, which refers to "any refugee who is not firmly settled in any foreign country (8 U.S.C. § 1157(c)(1)), does not contain any express extraterritorial language,[7] any more than does Section 1253(h). If the presumption against extraterritoriality applies to one statute, it should apply equally to the other. The government should not be allowed to turn the presumption on and off like an appliance.

In short, the subject matter of these related sections of the INA is inherently international. The Executive properly enforces the INA outside the boundaries of the United States when that is its evident meaning -- as in the instances of interdiction and asylum applications -- even when there is no clear language suggesting extraterritorial application. By the

[6] Executive Order 12324 also cites as authority Section 215(a)(1) of the INA, 8 U.S.C. § 1185(a)(1), which makes it unlawful "for any alien to depart from or enter or attempt to depart from or enter the United States" except pursuant to regulation. While this obviously applies to aliens at the borders of the United States, it does not self-evidently give the Executive authority to range about the world interdicting and returning refugees. Again, a strong presumption of extraterritoriality is inconsistent with executive practice.

[7] Such a person could be physically present anywhere in the world, inside or outside the United States. The qualification that he may not be "firmly settled in any foreign country" has nothing to do with his location at the time he applies for asylum under Section 207.

same token, Congress typically specifies geographical limitations where they are relevant. The presumption against extraterritorial application, which is wholly appropriate for domestic legislation, cannot be applied to this statute without doing violence to its accepted meaning in other contexts.

Thus, because Congress clearly intended Section 1253(h)(1) to apply extraterritorially, the first predicate for invoking the presumption against extraterritoriality is unavailable. The second predicate for invoking the presumption is also unavailable, given that application of United States law in this case does not threaten the jurisdiction of other nations.

There is every reason to doubt that the presumption against extraterritorial application applies to conduct taking place on the high seas. The roots of the presumption lie in the field of conflicts of law. In *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), the case in which the presumption first formally appeared, Justice Holmes explained the doctrine in terms of the traditional conflicts principle "that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *Id.* Courts presume that United States statutes apply only within the United States because such a presumption avoids the friction with sister states that comes from the attempt by each of two sovereigns to apply its own law to the same situation simultaneously . This concern does not arise in cases on the high seas, where no sovereign's law applies. *United States* v. *Wright-Barker*, 784 F.2d 161, 166 (3d Cir. 1986); *United States* v. *Romero-Galue*, 757 F.2d 1147, 1149 n.1 (11th Cir. 1985)[8]. Where there can be no

[8] This principle is incorporated into the Convention on the High Seas, 13 U.S.T. 2312, T.I.A.5. No. 5200 (entered into force Sept. 30, 1962), to which the United States is a signatory.



conflict of law there is no need for a presumption to avoid one.

In *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), this Court invoked the presumption against extraterritorial application in a tort case arising "on the high seas some 5,000 miles off the nearest shores of the United States." *Id.* at 440. In that case, however, the relevant statutory provision expressly limited coverage to damage "occurring in the United States" (28 U.S.C. § 1605(a)(5), quoted at *id.* at 439). The presumption was thus used merely to reenforce the plain language of the statute. This is the converse case. If the Court held in *Argentine Republic* that the language "in the United States" meant that damage on the high seas was not within the reach of the statute, it follows that in this case, Congress's removal of the language "within the United States" would mean that the statute encompasses the high seas.

For all of these reasons, the presumption against extraterritorial application of United States law has no bearing on the analysis of Section 1253(h)(1). Petitioners may therefore not avoid the plain language of the statute.

5. Finally, Article 33.1 of the United Nations Convention Relating to the Status of Refugees, on which § 1253(h)(1) was modeled, see *Cardoza-Fonseca*, 480 U.S. at 429, confirms the lesson of the text: Section 1253(h)(1) applies to aliens both within and without the United States. Article 33.1 provides:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

189 U.N.T.S. 150, 176 (1954).

In construing a treaty, this Court looks first to the governing language. *United States* v. *Alvarez-Machain*, 112 S. Ct. 2188, 2193 (1992); *Air France* v. *Saks*, 470 U.S. 392, 397 (1985). That principle of treaty construction is also codified in Article 31 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (*entered into force* Jan. 27, 1980), to which the United States is a signatory. As with statutes, treaties are to be construed with reference to their terms' "ordinary meaning * * * in their context," and "in light of their object and purpose." *Ibid.*

Article 33.1 contains no express restrictions on the places in which the Contracting States' obligations attach. Moreover, Article 33.1 expressly distinguishes *expelling* and *returning* a refugee. To ascribe to the term "return ('*refouler*')" the meaning, suggested by petitioners, of removing only aliens within a Contracting State's territory, would make the term redundant. As petitioners admit, the term "expel" in Article 33.1 "refer[s] to the formal process for removing an alien who was admitted to the country[; return, or r]efoulement, by contrast connotes 'summary reconduction' (mere physical relocation) of an individual." Br. 39 (citations omitted). Accordingly, Article 33.1 essentially reads: "No contracting State shall expel or return (physically relocate) a refugee in any manner whatsoever to the frontiers of territories" where he faces persecution. Thus, just as with the term "return" in Section 1253(h)(1), what is important under Article 33.1 is the place *to* which the refugee is to be returned, not the place *from* which he is returning.

The text and structure of the Refugee Convention as a whole lend further support to this reading. First, under the Protocol, a "refugee" is "any person who * * * owing to a well-founded fear of being persecuted * * * is outside the



country of his nationality." Consequently, a "refugee" under this Protocol, like "any alien" under Section 1253(h)(1), is defined not with regard to his current location but with regard to his past location (to which he is threatened with return in the future).

Second, other articles of the Refugee Convention use language which carry a more limiting effect on the term "refugee." See, *e.g.*, Article 4 ("refugees within their territories"); Articles 15, 17.1, 19.1, 21, 23, 24.1, 28 ("refugees lawfully staying in their territory"); Articles 18, 26, 32.1 ("refugee lawfully in its/their territory"); Article 27 ("refugee in their territory"). Indeed, paragraph 2 of Article 33 states that the benefit of this article may not be claimed by any refugee who is a danger to the security of "the country in which he is." 189 U.N.T.S. at 176. As in the INA, these articles, and paragraph 2 of Article 33 in particular, show that the drafters (1) knew how to limit an article's application to refugees within the territory of a Contracting States, and (2) included that limitation in those articles that focus on the need for removal or retention of a refugee within a Contracting State's territory in order to protect the interests of that State. Article 33.1, like Section 1253(h)(1), by contrast, contains no such limitation because it focuses on protecting the refugee by preventing the return, "in any manner whatsoever," of such refugee into the hands of his persecutors.[9]

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[9] Moreover, Article 40.1 of the Refugee Convention, which provides that a State may "declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible" does not, as petitioners contend, Br. 36-37, indicate that the scope of Article 33.1 is limited to the Contracting State's metropolitan territory. Article 40.1 simply allows each state to bind its territorial possessions to the same

(continued...)

In short, Article 33.1 unambiguously prohibits Contracting States from "returning a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" because of his political opinion, regardless of the refugee's present location. By incorporating the language of this article, Section 1253(h)(1) accomplishes the same purpose: it strictly limits the Attorney General's discretion in the return of aliens and forbids their return into the hands of those who would persecute them. Executive Order No. 12,807 violates the plain language of the INA by granting the Attorney General "unreviewable discretion" in the return of aliens and authorizing Executive officials to return Haitian refugees forcibly and summarily into the hands of their persecutors.

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[9] (...continued)
obligations that the State itself had assumed under the Refugee Convention. It does not restrict the scope of the these obligations to the geographical limits of these territories, or to the geographical limits of the Contracting State itself.



## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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